Foreign Relations Federalism in the United States and the European Union

Hierarchy versus pluralism, and the pitfalls of 'as if' constitutionalism

Abstract: *Taking its cue from the recent rise in antagonism between the European Union institutions and Member States, this paper comparatively examines the constitutional framework within which the European Union and the United States engage in foreign relations. The picture that emerges is one in which hierarchy (US) is contrasted with pluralism (EU). This contrast is an invitation for students of EU foreign relations law to revisit certain deeply held assumptions, in particular those underlying the constitutional paradigm through which EU foreign relations law has been studied in recent decades, both in its traditional hierarchical and in its more recent pluralist incarnations. An exploration of the US experience points to the limits of what legal argument and litigation can achieve in this area; it highlights the importance of structural features of the constitutional framework, such as the role of fiscal and military capacities, and points to the need to be mindful, including when interpreting the EU Treaties, of the wider geopolitical environment within which the EU is required to operate. The paper argues that the EU today is caught in a pluralist predicament, between a supranational desire to consolidate, and increased Member State resistance against doing so. To escape from this deadlock, increased mutual trust is required. The path towards such increased trust is not only legal, but also political; it requires sustained political action at both EU and Member State level.*

INTRODUCTION

2016 has been a tumultuous year for European Union foreign relations.[1] Antagonism between EU institutions and between EU institutions and Member States has increased; decision-making paralysis occurs increasingly often.[2] Two examples illustrate these difficulties. Early

[1] EU foreign relations as understood in this paper includes both the former 'first pillar', which deals with issues such as international trade, environmental policy, development aid, as well as the common foreign and security policy (CFSP). Mindful of the interdependence of both 'pillars' in articulating and implementing foreign policy, as well as the stated objective of the Treaty of Lisbon to integrate both 'pillars', a joint treatment is warranted.

[2] In this sense, see e.g. Ricardo Gosalbo-Bono & Frederik Naert, *The Reluctant (Lisbon) Treaty and its Implementation in the Practice of the Council*, *in* THE EUROPEAN UNION'S EXTERNAL ACTION IN TIMES OF CRISIS 13–84, 18 (Piet Eeckhout & Manual Lopez-Escudero eds., 2016): "Divergent institutional positions on many fronts have resulted in serious inter-institutional conflicts..." Predicting these difficulties in particular on division of competence issues, see Peter Van Elsuwege, *The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty*, *in* THE

2016, the EU wished to formally conclude an association agreement with Ukraine.[3] When the Dutch electorate voted down the agreement, the EU failed to deliver on its promise to Ukraine to conclude the agreement in a timely fashion.[4] Political in Kiev unrest ensued.[5] In February 2017, the Dutch parliament did ratify the agreement[6], but only after the heads of state and government of the EU Member States agreed to attach an interpretive declaration to the agreement, in which they emphasized that the agreement did not open a path towards EU membership.[7]

In the summer and fall of 2016, a similar controversy arose in the area of international trade. For several years, the EU had been in the process of negotiating a Comprehensive Economic and Trade Agreement with Canada. Throughout the negotiation process, the EU Commission had told the Canadian authorities that the final agreement would be concluded as an EU-only agreement, to be adopted on the basis of the EU's exclusive competence to conduct a common commercial policy.[8] In the summer of 2016, however, the European Commission changed course, and – against the advice of its legal service – decided that the agreement was

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EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW: CONSTITUTIONAL CHALLENGES 115–136, 135 (Marise Cremona & Anne Thies eds., 2014): "Despite all intentions of the Lisbon Treaty reform, inter-institutional conflicts on competence delimitation appear unavoidable in the complex legal framework of the EU."

[3] The agreement had been signed in part on 21 March 2014 and in part on 27 June 2014. See respectively Ukraine crisis: EU signs association deal, BBC NEWS, March 21, 2014, http://www.bbc.com/news/world-europe-26680250 (last visited Apr 6, 2017). And Europe News.Net - Defying Russian opposition Ukraine signs accord with EU, EUROPE NEWS, www.europenews.net/news/223325425/defying-russian-opposition-ukraine-signs-accord-with-eu (last visited Apr 6, 2017).

[4] Netherlands rejects EU-Ukraine partnership deal, BBC NEWS, April 7, 2016, http://www.bbc.com/news/world-europe-35976086 (last visited Apr 6, 2017).

[5] David Stern, DUTCH REFERENDUM SHAKES UKRAINE POLITICO (2016), http://www.politico.eu/article/dutch-referendum-shakes-eu-ukraine-association-agreement-petro-poroshenko/ (last visited Apr 6, 2017).

[6] Rutte krijgt steun Kamer voor zijn "inlegvel" Oekraïne-verdrag, NOS, February 21, 2017, http://nos.nl/artikel/2159402-rutte-krijgt-steun-kamer-voor-zijn-inlegvel-oekraine-verdrag.html (last visited Apr 6, 2017).

[7] The declaration was attached to the conclusions of the European Council meeting of 15 December 2016, available at <http://data.consilium.europa.eu/doc/document/ST-34-2016-INIT/en/pdf> accessed 6 April 2017. For an analysis of the declaration's content, see Peter Van Elsuwege, TOWARDS A SOLUTION FOR THE RATIFICATION CONUNDRUM OF THE EU-UKRAINE ASSOCIATION AGREEMENT? VERFASSUNGSBLOG (2016), http://verfassungsblog.de/towards-a-solution-for-the-ratification-conundrum-of-the-eu-ukraine-association-agreement/ (last visited Apr 6, 2017).

[8] In this sense, see Armand de Mestral & Markus Gehring, *EU should have told Canada years ago it was moving the CETA goal posts*, THE GLOBE AND MAIL, October 21, 2016, http://www.theglobeandmail.com/report-on-business/rob-commentary/eu-should-have-told-canada-years-ago-it-was-moving-the-ceta-goal-posts/article32463376/ (last visited Dec 13, 2016): "Canadians have been surprised to learn that the EU-Canada Comprehensive Economic and Trade Agreement (CETA) might not, after seven years of negotiations, be signed on Oct. 27 by Prime Minister Justin Trudeau in Brussels as planned."

to be concluded not by the EU alone, but by the 28 Member States as well[9]; it was to become, in other words, a 'mixed' agreement.[10]

In October 2016, the Council wished to adopt a decision authorizing the signing and provisional application of the EU-Canada agreement.[11] As the agreement was to be 'mixed' in nature, it is standing practice within the Council to proceed on a consensual basis, even though the EU Treaties provide for decision-making by qualified majority vote. As was perhaps to be expected in a framework in which at least 29 parties (28 Member States and the EU) need to come to an agreement, collective action problems arose. In particular, the Belgian region of Wallonia – a region with a population of 3 million – refused to authorize the Belgian federal authorities to, in turn, authorize the signing and provisional application of the EU-Canada agreement.[12]

Again, a crisis ensued, leading Canadian Prime Minister Trudeau to wonder: 'If in a week or two we see that Europe is unable to sign a progressive trade agreement with a country like Canada, well, then with whom will Europe think that it can do business in the years to come?', adding that if the agreement fails people will ask, 'what is the point of the EU?'[13]

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[9] Gehring and de Mestral have suggested that the European Commission's change of tactics was caused also by the ruling by the German *Bundesverfassungsgericht* in which the Court suggested that Germany's consent to CETA Germany's consent would be on a provisional basis only, subject to a right to rescind and that the decision in the Council of the European Union be unanimous. See *Id.* And also Urteil vom 13. Oktober 2016 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/10/rs20161013_2bvr136816.html;jsessionid=35DF5C09520378E1D3622FD498F952E8.1_cid361 accessed 6 April 2017.

[10] 'Mixed agreements' are agreement to which not only the EU, but also some or – in most instances – all EU Member States are a party. Mixed agreements have been a feature of EU foreign relations since its inception. The 1961 association agreement with Greece, for example, was concluded as a mixed agreement. On mixed agreements, see MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD, (Christophe Hillion & Panos Koutrakos eds., 2010). Mixed agreements have often been understood as an inevitable but undesirable element of EU treaty-making. In this sense, see e.g. C.-D. Ehlermann, *Mixed Agreements - A Set of Problems*, *in* MIXED AGREEMENTS (David O'Keeffe & Henry G. Schermers eds., 1983). For a defense of the practice, see Joseph Weiler, *The External Legal Relations of Non-unitary Actors: Mixity and the Federal Principle*, *in* THE CONSTITUTION OF EUROPE : ESSAYS ON THE ENDS AND MEANS OF EUROPEAN INTEGRATION. 130 (1999).

[11] See the Proposal for a Council decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part, COM(2016) 444 final, 5.7.2016.

[12] Belgian province may sink EU-Canada trade deal, BBC NEWS, October 11, 2016, http://www.bbc.com/news/world-us-canada-37603878 (last visited Apr 6, 2017). It should be noted that pursuant to Article 167 of the Belgian Constitution, Belgian regions and communities possess treaty-making powers on issues over which they have been allocated internal powers. On this peculiar feature of Belgian federalism, see e.g. Jan Velaers, *"In foro interno et in foro externo": de internationale bevoegdheden van gemeenschappen en gewesten*, *in* INTERNATIONALE BETREKKINGEN EN FEDERALISME: STAATSRECHTCONFERENTIE 2005 - VLAAMSE JURISTENVERENIGING 3–86 (Godfried Geudens & Frank Judo eds., 2006).

[13] Tim Wallace, *Canada walks out of EU trade talks declaring a deal "impossible" and Brussels "incapable,"* THE TELEGRAPH, October 21, 2016, http://www.telegraph.co.uk/business/2016/10/21/canada-walks-out-of-eu-trade-talks-declaring-a-deal-impossible-a/ (last visited Mar 25, 2017).

After last-minute negotiations between not only the Walloon and Belgian federal authorities, but also the European Commission and Canada's international trade minister Chrystia Freeland, an agreement was reached.[14] In exchange for Wallonia's agreement, the Belgian government committed *inter alia* to bringing before the European Court of Justice a request for an opinion on the legality of the proposed dispute settlement mechanism included in the EU-Canada agreement.[15]

Political considerations in part explain Mr Trudeau's comments on the 'point of the EU.' Like his trade minister, who in dramatic fashion returned to Canada when the talks broke down[16], Mr Trudeau had an interest in putting pressure on the EU. Questioning the EU's credibility as an international actor is a safe way to achieve this aim.[17] Despite these political motivations, it is nonetheless worth taking Mr Trudeau's remarks seriously. The Canadian and Ukrainian controversies are symptomatic of the difficulties the EU experiences in making decisions. This is the case in particular in the sphere of foreign relations – an area in which Member States, it is often said, are adamant to 'remain visible on the international stage', and because of this insist on making use of the 'mixity' formula.[18]

In the final analysis, the Ukrainian and Canadian controversies revolve around a question the EU is not the first to confront. Historically, other compound polities have faced similar questions on the appropriate balance between unity and diversity on the international stage. How much diversity ought a compound polity project onto the international stage? Or ought

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[14] Jennifer Rankin, *Belgian politicians drop opposition to EU-Canada trade deal*, THE GUARDIAN, October 27, 2016, https://www.theguardian.com/world/2016/oct/27/belgium-reaches-deal-with-wallonia-over-eu-canada-trade-agreement (last visited Apr 6, 2017).

[15] The intra-Belgian compromise is available here: http://www.lesoir.be/sites/default/files/1965727419_B9710082943Z.1_20161027164004_000_G0D7SMUCH.1-0.pdf accessed 6 April 2017.

[16] On Mrs Freeland's dramatic exit, see Aaron Wherry, *"The tactic has paid off:" Freeland's dramatic walk out didn't imperil CETA after all*, CBC NEWS, October 28, 2017, http://www.cbc.ca/news/politics/wherry-freeland-ceta-1.3824374 (last visited Apr 6, 2017).

[17] 'Credibility', Joseph Nye argues, 'is … an important resource of soft power. Reputation becomes even more important than in the past, and political struggles occur over the creation and destruction of credibility.' See JOSEPH S. NYE, THE FUTURE OF POWER 103–104 (2011).

[18] See e.g., in the context of the EU participation in international organizations, Ramses A. Wessel, *The Legal Framework for the Participation of the European Union in International Institutions*, 33 JOURNAL OF EUROPEAN INTEGRATION 621–635, 624 (2011), referring to the "general preference of member states to remain present and visible themselves in international institutions." Similarly, see Opinion of AG Kokott in *Commission v Council ('Conditional Access')*, C-137/12, para. 34, where the Advocate General summarized the Commission's argument before the Court as presuming that through its action the Council had intended artificially to create a mixed agreement in order to allow the Member States an international presence alongside the European Union.

the diversity that characterizes compound polities in the domestic sphere stop at the water's edge?[19] In the United States, in particular, discussions of this type played an important role in the process leading up to the ratification of the 1789 Constitution. In the *Federalist Papers*, the question of America's ability to tackle foreign interference in its domestic politics played a central role in the arguments advanced by John Jay and James Madison, leading the latter at one point to exclaim that 'if the United States were to be one nation in any respect, it clearly ought to be in respect to other nations.'[20]

Mindful of the fact that the EU is less unique than it is sometimes portrayed to be[21], this paper explores the constitutional balance between the EU and its Member States in the sphere of foreign relations. It does so, in particular, against the backdrop of the US experience.[22] By comparing the EU 'foreign affairs constitution' in this area with its US counterpart, this paper pursues a twofold aim. First, it contributes to fostering a greater understanding and knowledge amongst European audiences of the US experience in the area of foreign relations. By exploring how a functionally similar issue (i.e. the issue of striking an appropriate balance between unity and diversity in the sphere of foreign relations) has been addressed in the United States, students and practitioners of EU foreign relations law are invited to question

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[19] This question harks back to the broader question of whether it is appropriate to extend domestic constitutional principles to the external realm. The breaking down of the distinction between the domestic and the external in recent decades has brought this question to the forefront both in Europe and the United States. In the EU context, see e.g. PIET EECKHOUT, DOES EUROPE'S CONSTITUTION STOP AT THE WATER'S EDGE? : LAW AND POLICY IN THE EU'S EXTERNAL RELATIONS (2005), arguing that in light of the breakdown of the internal-external distinction it is necessary to apply domestic constitutional principles as much as possible to external issues. In the US, the debate on the 'normalization' of foreign relations law can be understood as fitting in this context as well. See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARVARD LAW REVIEW 1897–2098 (2015), identifying globalization as one of the causal factors behind the "normalization" of foreign relations law.

[20] GEORGE W. CAREY, THE FEDERALIST (THE GIDEON EDITION), EDITED WITH AN INTRODUCTION, READER'S GUIDE, CONSTITUTIONAL CROSS-REFERENCE, INDEX, AND GLOSSARY BY GEORGE W. CAREY AND JAMES MCCLELLAN No 42 (2001).

[21] The EU is often portrayed as a *sui generis* polity. For examples, see the references in Robert Schütze, *On "federal" ground : the European Union as an (inter)national phenomenon.*, 46 COMMON MARKET LAW REVIEW 1069–1105, 1091 (2009). For a characterization of the EU as a federal-type polity, see e.g. Schütze, *supra* note. In the same sense, see Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 142–164, 142 (2008), defining federalism as "the coexistence within a compound polity of multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority." On the EU as a federal-type polity and on federalism in Europe more generally, see ELKE CLOOTS, GEERT DE BAERE & STEFAN SOTTIAUX, FEDERALISM IN THE EUROPEAN UNION (2012).

[22] In doing so, the paper builds on earlier work in this comparative tradition. See seminally E. Stein & L. Henkin, *Towards a European Polity? The European Foreign Affairs System from the Perspective of the United States Constitution*, I-3 *in* INTEGRATION THROUGH LAW 3–82 (M. Cappelletti, M. Seccombe, & J. Weiler eds., 1986). More recently, see also Robert Schütze, *Federalism and Foreign Affairs. Mixity as a (inter)national phenomenon*, *in* FOREIGN AFFAIRS AND THE EU CONSTITUTION: SELECTED ESSAYS 175–208 (2014); Geert De Baere & Kathleen Gutman, *Federalism and International Relations in the European Union and the United States: A Comparative Outlook*, *in* FEDERALISM IN THE EUROPEAN UNION 131–166 (Elke Cloots, Geert De Baere, & Stefan Sottiaux eds., 2012).

the existing constitutional framework in the EU[23] – a framework, which, due to a misguided yet persistent belief in the *sui generis* nature of the EU, is often considered to be the only possible way for the EU to engage in foreign relations.[24]

Second, the paper makes a first step towards critically re-examining the intellectual framework within which analyses of the EU constitutional framework are undertaken. Against the backdrop of the US experience, and drawing on the literature on constitutional pluralism, the paper characterizes the gap between constitutional principle as articulated by the ECJ on the one hand and Council institutional practice on the other hand as a manifestation of systemic pluralism. Contra the normative orientation of much of the literature on pluralism in the judicial setting, however, this 'pluralist predicament', the paper suggests, is not sustainable and therefore not desirable, at least not in the context of foreign relations. For foreign relations, in particular in an increasingly hostile international environment, has a zero-sum character: in the final analysis, the paper demonstrates, diversity – as reflected in the Council's practice of mixity – prevails, and little room for unity remains available, leading to difficulties of the type described in the above.

This observation raises a fundamental question for the constitutionalism paradigm, both in its hierarchical and pluralist manifestations – a paradigm which, at least as a practical matter, continues to dominate EU legal discourse, both amongst academic commentators and practitioners.[25] Ought the legal argument in favor of further unity be pressed further, if

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[23] The epistemic community that produces legal discourse on EU foreign relations law is small, consisting mainly of practitioners within the EU institutions – in particular the legal services of the Commission, Council, Parliament and the ECJ – as well as a number of commentators with close ties to those institutions. Genuine comparative work is not often performed by members of this community, perhaps because the direct practical relevance of such work is not always immediately apparent. This is not to suggest, however, that no comparative work is done at all. See e.g. ROBERT SCHÜTZE, FOREIGN AFFAIRS AND THE EU CONSTITUTION: SELECTED ESSAYS (2014), drawing heavily from the US experience.

[24] In this sense, the exploration of the US experience serves to create a space for critical analysis of the EU foreign affairs constitution. As Günter Frankenberg argued: 'Distance is needed to gain a vantage on who we are and what we are doing and thinking. Distancing can be described as an attempt to break away from firmly held beliefs and settled knowledge and as an attempt to resist the power of prejudice and ignorance. From a distance old knowledge can be reviewed and new knowledge can be distinguished as it is in its own right. Distance de-centers our world-view and thus establishes what might be called objectivity.' See Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARVARD INTERNATIONAL LAW JOURNAL 411–457, 414 (1985). On the value of identifying 'false necessities', see also, from a pragmatic perspective, as opposed to Frankenberg's critical viewpoint: Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 THE YALE LAW JOURNAL 1225, 1227 (1999): "Comparative study is sometimes said to allow a person embedded in one system to gain some distance from it. Having become intellectually estranged from that system, one can then see that seemingly unchangeable arrangements actually might be altered without substantial loss and sometimes with substantial gain. Familiar arrangements seem necessary to us, but comparative study demonstrates that they might be false necessities."

[25] For a seminal articulation of the constitutional paradigm, see Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1–27 (1981).

necessary by means of litigation before the ECJ? Again, an exploration of the US experience in this area points to the limits of what legal argument can achieve. Required, the paper suggests, is increased mutual trust. Only in the presence of mutual trust will constitutional changes, for example the establishment of independent fiscal and military capacities for the EU, become a possibility. For such trust to emerge, however, what is needed is sustained political action, both at national and EU level. At the national level, Europeans must hold their representatives in the Council accountable, and urge them to act in accordance with the common EU interest. At the EU level, political action is required to open up the Council 'black box.' For only through increased transparency will meaningful accountability become a possibility.

The paper develops this argument in three parts. A first part explores the federal-state relationship in the US. A second part undertakes a similar inquiry into the EU-Member State relationship against the backdrop of the US experience. A third part engages in the abovementioned reflection on the sustainability and desirability of Europe's pluralist predicament.

FEDERALISM AND FOREIGN RELATIONS IN THE UNITED STATES: PRAGMATIC TOLERANCE WITHIN A HIERARCHICAL FRAMEWORK

What is the structure of the federal relationship in the US? The text of the Constitution is not entirely conclusive: the framers have delegated some powers to Congress and the President, and have prohibited the states from engaging in certain activities that could affect the nation's foreign relations.[26] From the outset, however, the Constitution has been interpreted as placing the federal government at the steering wheel of foreign policy-making in the US.[27]

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[26] See in particular Article I §8 Cl 3 (Congressional power to regulate foreign commerce), Cl 10 (Congressional power to define and punish piracies and felonies committed on the high seas and offences against the law of nations), Cl 11 (Congressional power to declare war), Cl 12 (Congressional power to raise and to support armies), Cl 14 (Congressional power to make rules for the government and regulation of the land and naval forces), Cl 18 (Congressional power to adopt laws 'necessary and proper or carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof'; Article II §1 Cl 1 (Presidential executive power), §2 Cl 1 (Presidential Commander in Chief power), Cl 2 (Presidential treaty-making power, with advice and consent by the Senate, and power to nominate and, by and with the advice and consent of the Senate appoint ambassadors and consuls). Article I §10 prohibits the states from engaging in a number of activities, including entering into treaties, alliances or confederations, or to enter into agreements or compacts with foreign powers without Congressional approval.

[27] In this sense, see e.g. David M. Golove & Daniel J. Hulsebosch, *Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition, A*, 85 NYUL REV. 932, 989 (2010): "Considered as a whole, and understood in historical perspective, the text establishes a comprehensive regime for dealing with foreign affairs with an eye equally on centralizing all of the relevant powers in the federal government and on ensuring, as far as possible, that the federal government would uphold the nation"s international duties'.

This section describes the ways in which the supremacy of the federal government in this area has been ensured.[28] For a long stretch of time, 'foreign relations' was understood as a distinct policy area, which in its entirety had been delegated to the federal government. Within this paradigm, the states were categorically precluded from engaging in activities that could be understood as affecting the effectiveness of the federal government's foreign policy. This categorical approach will be unpacked further in a first section.

In the second half of the twentieth century, a gradual shift has taken place whereby in Supreme Court case law categorical language was replaced with a language of balancing and a preference for settling disputes between the federal government and states by applying preemption principles. This shift towards a preemption paradigm will be explored in section two. The section will explain how, despite the turn to preemption, through a reliance on functionalist arguments, the 'just supremacy' of the federal government in the area of foreign relations nonetheless remains protected. The overall image that emerges from this analysis, therefore, is one in which the US federal government is fully in control over US foreign relations. States are able to engage in foreign relations, but they do so at the mercy of the federal government. In short: the US constitutional framework is characterized by a pragmatic tolerance towards state foreign relations within a constitutional framework which is hierarchical in nature.

The categorical paradigm: foreign relations as an exclusively federal area of law- and policy-making

In the early decades of the American Republic, courts were adamant on protecting the position of the young federal government as the only representative of the United States on the international stage.[29] The 1840 case of *Holmes v Jennison* is a first illustration of this early

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[28] As US states – unlike EU Member States – are precluded in general terms from making treaties (see Article I §10 Cl 1 of the Constitution), federalism issues emerge in the US context in less visible ways. Litigation in this area typically pits the federal government against an individual state, which has enacted a statute that the federal government understands as affecting and potentially conflicting federal foreign policy. This paper does not address the issue of potential federalism restrictions on the scope of the federal government's treaty making power. In an era in which the federal government's domestic legislative authority is very broad, the issue of possible restrictions on the federal government's external powers is not salient in practical terms. On this subject, see e.g. E. T Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUMBIA LAW REVIEW 403–533 (2003), arguing that "federalism does not constrain the treaty power, when the Constitution is read as an organic whole and interpreted in a fashion in keeping both with international law and the New Federalism itself." It is noteworthy that in the Supreme Court case of *Bond v United States*, only Justice Thomas subscribed to the view that federalism limits the scope of the treaty-making power, and that only Justice Thomas and Scalia subscribed to the view that the power to implement treaties is not broader than Congress' Article I legislative powers. See *Bond v United States*, 572 U. S. ____ (2014).

[29] Golove and Hulsebosch, *supra* note 27 at 989.

approach.[30] When asked to rule on the constitutionality of a decision by the governor of Vermont to extradite a Mr Holmes to the Canadian authorities, the Supreme Court ruled that 'any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in separate states', and that '[p]rovisions were therefore introduced to cut off all negotiations and intercourse between the state authorities and foreign nations.'[31] In this case, foreign relations were understood broadly, as encompassing all contacts with foreign powers, including on issues with little political salience. The authority to engage in such contacts, the argument ran, had been delegated exclusively to the federal government.

A similar approach could be seen at work in the 1889 *Chinese Exclusion* case, a case which did not directly raise federalism questions, but in which the Supreme Court nonetheless was adamant to emphasize the central role of the federal government in conducting the nation's foreign relations.[32] Mr Chan Chae Ping, a lawful US resident, was barred entry to the US when returning from a visit to China. During his absence, Congress had adopted the 1888 Scott Act. This Act overturned elements of a US-Chinese treaty on the basis of which Mr Chan Chae Ping had previously obtained a US visa. The Supreme Court confirmed the constitutionality of the Scott Act. It did so on the basis of the argument that the Constitution had delegated to the federal government all powers typically associated with sovereign statehood. The Supreme Court, Justice Field, held that 'the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.'[33]

The categorical approach to foreign relations according to which it was conceptually inconceivable for US states to engage in foreign relations was articulated most forcefully by Justice Sutherland in the 1937 cases of *Curtiss-Wright* and *Belmont*.[34] In *Curtiss-Wright*, the

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[30] 39 U.S. 540 (1840).

[31] Ibid, 573-574.

[32] *Chae Chan Ping v. U.S. ('Chinese Exclusion Case')*, 130 U.S. 581 (1889).

[33] Ibid, 604. At issue in *Chinese Exclusion* was also the question of whether an Act of Congress can override a treaty. The question arose because the Supreme Clause characterises both types of norms as the 'supreme law of the land.' The Court here introduced the 'later-in-time' rule, according to which the later norm controls.

[34] *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936) and *U.S. v. Belmont*, 301 U.S. 324 (1937). The theory Justice Sutherland articulated in these cases he had defended in earlier scholarly writings. See in particular GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS (First edition 1919 ed. 2013).

Supreme Court was invited to rule on the legality and constitutionality of a decision by the President to prohibit arms sales to Columbia. A number of arms exporters questioned the legality of the President's decision by arguing the President had overstepped the boundaries of the powers Congress had delegated to him by means of a resolution.

Even though the dispute could be resolved without reaching the constitutional question of the scope and nature of the President's (and by extension the federal government's) powers over foreign relations, Justice Sutherland in *Curtiss-Wright* articulated a theory of Presidential authority that potentially left no room at all for other actors – Congress and *a fortiori* the states – to engage in activities that could affect the nation's foreign relations. In Sutherland's view, all powers pertaining to foreign relations had been transferred from the British Crown directly to the federal government, to which 'external sovereignty' had passed when the US had acquired independence from the United Kingdom.[35] It followed, Sutherland argued, that the 1789 Constitution could not delegate powers over foreign relations to the federal government, as the states and the people had nothing to delegate in the first place.

In addition, Justice Sutherland advanced functionalist arguments to justify the President's central role in foreign policy-making.[36] He held:

> It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other

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[35] *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936), 318: '[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.'

[36] 'Functionalism' is an approach to constitutional interpretation driven by a desire to ensure that the institutions the constitution establishes are practically able to fulfil the functions for which they were established. Functionalist reasoning, in this sense, is consequentialist: it focusses on the effects of a decision and whether or not these effects are desirable. On consequentialism as a method of interpretation, see LACKLAND H. BLOOM (JR.), METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION ch 10 (2009).

> officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.[37]

In the case of *Belmont*, which came before the Supreme Court shortly after *Curtiss-Wright*, the Supreme Court, again Justice Sutherland, expressed more directly what this extra-constitutional theory of federal authority over foreign relations implied for the federal-state relationship.[38] The case involved a challenge by the federal government against the estate of a deceased Mr Belmont, a banker, who had refused to transfer to the federal government assets which were owned previously by Russian entities and which, as provided for in a US-Soviet agreement, were to become property of the United States. The transfer, the Belmont estate argued, violated New York State public policy. Justice Sutherland, writing for the majority, considered this factor irrelevant. He did not consider it necessary to examine whether release of the funds violated New York public policy, since the matter pertained to the United States' foreign relations – the release of the sums falling within the scope of the agreement between the US and Soviet authorities. 'Governmental power over internal affairs', Justice Sutherland argued, 'is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government.'[39] And he continued:

> In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. Within the field of its powers, whatever the United States right-fully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.[40]

The Supreme Court reversed the judgment of the lower court and ordered the Belmont estate to release the sums to the US authorities. As in *Holmes* and *Chinese Exclusion*, the *Curtiss-Wright* and *Belmont* Courts approached the federal-state relationship in the sphere of foreign relations in categorical terms. The approach relied on a clear-cut separation between domestic

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[37] Ibid, 320.

[38] *U.S. v. Belmont*, 301 U.S. 324 (1937).

[39] Ibid, 330-331.

[40] Ibid., 331.

and international affairs, whereby only the federal government was understood as playing a role in foreign relations.

The preemption paradigm: preemption, but with functional undertones

In the second half of the 20th century, the categorical paradigm gradually made way for a paradigm within which it is no longer accepted as an article of faith that US states are categorically precluded from engaging in activities that could affect the nation's foreign relations. This shift arguably created a constitutional space within which US states can engage in activities that touch on the nation's foreign relations. It became conceivable, for example, for states to conclude non-binding agreements with third country governments[41], or to undertake joint initiatives, as they have done e.g. in the area of environmental protection.[42] However, this shift in methodology should not be understood as a fundamental shift in the structure of the relationship between the federal and state governments. As will be explained below, at a structural level, the supremacy of the federal government in the sphere of foreign relations remains protected: by including functionalist factors in the preemption analysis, courts aim to ensure the full effectiveness of federal foreign policy.

A first crack in the categorical paradigm could be observed in the 1968 case of *Zschernig*.[43] *Zschernig* involved a challenge against an Oregon statute which made dependent the possibility for aliens to inherit Oregon-based property on the existence of reciprocity in the aliens' home jurisdiction. Since a measure of this type invited US courts to make determinations of the degree in which the rule of law was respected in foreign countries, the Supreme Court, Justice Douglas, considered the Oregon statute to be in violation of the federal government's authority over foreign relations.

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[41] On this practice, see generally Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEXAS LAW REVIEW 741 (2009). Hollis describes how, through an application by analogy of Supreme Court case law on the constitutionality of interstate compacts, a category of compacts between state and foreign governments became understood as not falling within the scope of the Foreign Compact Clause (Article I §2 Cl 3 of the US Constitution: 'No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay').

[42] For an overview of state international activities, see MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY ch 2 (2016). This phenomenon fits within a broader pattern. For a comparative overview, see e.g. DAVID CRIEKEMANS, REGIONAL SUB-STATE DIPLOMACY TODAY (2010).

[43] *Zschernig v. Miller*, 389 U.S. 429 (1968).

Zschernig is typically remembered as a ruling in which the Supreme Court endorsed a particularly broad reading of the federal government's authority in the sphere of foreign relations.[44] At closer inspection, however, the ruling diverges from the categorical paradigm defended a few decades earlier in *Curtiss-Wright* and *Belmont*. In particular, *Zschernig* diverged from Sutherland's theory through the weight the Court gave to the practical effects of the application of the Oregon statute. In particular, Justice Douglas suggested that the statute infringed on the federal government's authority over foreign relations *precisely because* it invited state judges to engage in political assessments of the degree in which foreign regimes aligned with American values of democracy and the rule of law.[45] The reliance on the practical application of the Oregon statute arguably distinguishes *Zschernig* from earlier case law, in particular *Curtiss-Wright* and *Belmont*. In this sense, the case can be understood as a first step towards the preemption paradigm that fully emerged at the end of the 20th century.

In its more recent case law on the subject of federalism in the sphere of foreign relations, the Supreme Court resolves conflicts between the federal government and state governments through an application of preemption principles. Before proceeding further, it is useful to briefly explore what is understood in US constitutional law by the notion of 'preemption.' 'Preemption' refers to the displacement of state law by federal law by virtue of the Supremacy Clause. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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[44] *Zschernig* is known, in particular, for introducing a 'dormant' form of 'foreign affairs preemption.' On this doctrine, see e.g. Matthew Schafer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201 (2011). Schafer understands *Zschernig* and the foreign affairs preemption doctrine it introduces as rooted in an understanding of the federal government's foreign affairs powers as being exclusive in nature. See *Id.* at 204.: "The dormant foreign affairs doctrine is rooted in an exclusive federal government foreign affairs power. By definition, if a power is exclusive to the federal government, then states are denied such power irrespective of whether the federal government has utilized its power."

[45] Justice Douglas referred to judgments by Oregon courts as 'radiat[ing] some of the attitudes of the 'cold war,' where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory. See *Zschernig v. Miller*, 389 U.S. 429 (1968), 435. In its emphasis on the application of the Oregon statute, Douglas distinguished *Zschernig* from the earlier case of *Clark v Allen*, in which the Supreme Court had upheld a statute which facially resembled the Oregon statute at issue in *Zschernig*, but which, crucially, did not invite courts to embark in similar types of inquiries. See Clark v. Allen, 331 U.S. 503 (1947).

The text of the Supremacy Clause appears to suggest that state law can only be struck down on preemption grounds if it conflicts with one of the reference norms included in the Clause, i.e. the Constitution, federal statutes and, hypothetically, treaties.[46] The question of when exactly the Supremacy Clause requires a state norm to be invalidated is highly fact-dependent.[47] To facilitate the inquiry, Congress can include in a federal statute an express preemption provision, in which it provides state authorities guidance on how to avoid preemption and courts on how to resolve conflicts. In the absence of such a provision, state norms will be invalidated in the event of a genuine conflict (i.e. when a simultaneous application of both norms is physically impossible), if the state norm is an obstacle to the application of the federal law, or when Congress, by adopting a statute or a statutory scheme, has indicated a willingness to 'occupy the field.'[48]

The 1999 case of *Crosby* provides a first example of a judgment in which the Supreme Court applied preemption principles to a case involving foreign relations.[49] *Crosby* involved a Massachusetts statute which prohibited government agencies from buying goods or services from companies that conducted business in Burma (Myanmar). Under the categorical paradigm, the Massachusetts statute arguably could have been struck down as an infringement on the federal government's exclusive powers over foreign relations. Justice Souter nonetheless took a different course, and invalidated the statute on the grounds that it represented an obstacle to the effectiveness of a federal statute by which Congress had introduced similar sanctions against Burma.

Crosby has been praised by commentators.[50] It has been understood, in particular, as carving out a space for individual states to engage in foreign relations alongside the federal

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[46] For treaties to benefit from the conflict rule set out in the Supremacy Clause, they must be recognized as being 'self-executing.' In particular since the Supreme Court ruling in *Medellin v Texas* (552 U. S. ____ (2008)), this has become an increasingly rare occurrence.

[47] In this sense, see Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 THE SUPREME COURT REVIEW 253–344, 255 (2012): "Congress"s pre-emptive intent ... varies by context, and courts faithful to interpreting that intent will thus produce varying results from one context to another'.

[48] For a useful summary of preemption doctrine, see Justice Kennedy's opinion in *Arizona v US*, 567 U.S. ___ (2012), pp 7-8. See also generally WILLIAM W. BUZBEE, PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (2008).

[49] *Crosby et al. v National Foreign Trade Council*, 530 U. S. 363 (2000).

[50] See in particular Peter J. Spiro, *Foreign Relations Federalism*, 70 UNIVERSITY OF COLORADO LAW REVIEW 1223 e.s. (1999). Daniel Halberstam has suggested that *Crosby*, even if it does not expressly endorse the possibility of State international action, can nonetheless be read as tolerant towards such action. See Daniel Halberstam, *The Foreign Affairs of Federal Systems: a National Perspective on the Benefits of State Participation*, VILLANOVA LAW REVIEW 1015–1068 (2001).

government. Such an approach, they argued, was more in tandem with contemporary realities of a globalized international environment.[51]

However, the impact of *Crosby* should not be overstated. In subsequent and – perhaps not coincidentally also post-9/11 – case law, the Supreme Court did reaffirm its approach of applying preemption principles to cases touching on the nation's foreign relations, but it did so in a manner that leaves little chance for state governments to prevail over the federal government. In particular, through a reliance on functionalist considerations, the Supreme Court can be understood as ensuring that when contested, state law cannot undermine the effectiveness of federal foreign policy.[52]

In the Supreme Court's more recent case law involving the federal-state relationship, functional considerations of this type undeniably played a role. In the majority opinion in the 2003 case of *Garamendi*, for example, Justice Souter relied on the ability of a California statute to 'interfere with the President's conduct of the Nation's foreign policy' to conclude in favor of a California statute's unconstitutionality.[53] He considered, in particular, that the California statute 'compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments.'[54] Similarly, in the case of *Arizona v United States*, on the constitutionality of Arizona statutory provisions on the subject of immigration, Justice Kennedy argued in favor of striking down one aspect of the statute because he considered it 'fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate states.'[55]

The picture that emerges from an analysis of *Garamendi* and *Arizona* is perhaps best captured by Kerry Abrams, who used the metaphor of a scale to refer to the Supreme Court's approach

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[51] This is particularly visible in Spiro's work, who has relied on globalization as requiring an overhaul of the foreign relations constitutional framework aimed at extending domestic constitutional principles to the external sphere. See Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649–730, 649 (2002), arguing that "[i]n so far as these elements of globalization lower the risk of catastrophic interstate conflict and take account of actors outside of the traditional diplomatic apparatus, differential foreign relations doctrines departing from baseline norms of judicial review, federalism, and individual rights are appropriately contested."

[53] *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

[54] Ibid, 424.

[55] Ibid.

to preemption in foreign relations cases.[56] In contrast to *Curtiss-Wright*, the Supreme Court approaches federalism questions in the sphere of foreign relations no longer in straightforward categorical terms. Rather, the Court makes an assessment of the relevant factors, placing weights on both sides of the scale, and waiting to see where the scale would find its equilibrium.[57] The federal-state relationship no is longer a black-or-white matter (if it ever was); the states and the federal government often operate within a single sphere of concurrent powers. However, Abrams added, functionalist arguments of the type referred to in the above operate as if a very heavy thumb has been placed on the federal government's side of the scale, making it quite unlikely for the scale to find its equilibrium on the side of the state.

Where does this leave the states? Could it be argued that the Supreme Court, through its use of functionalist arguments, has revived *Curtiss-Wright* through the backdoor and, in doing so, has kept the door shut for states to engage in foreign relations, be it directly (through contacts with foreign governments) or indirectly (through legislation affecting foreign governments)?[58] The answer must be nuanced. On the one hand, it is difficult to see how the autonomy of individual states can be sustained within a functionalist framework according to which the need to act effectively on the international stage is regarded as an important value worthy of judicial protection. In a related context, Justice Scalia referred to this risk, where he held that

> [f]unctionalism of the sort the Court practices today will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs. It is possible that this approach will make for more effective foreign policy, perhaps as effective as that of a

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[56] Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 603 (2013). The scale metaphor is often used to refer to judicial practices of balancing. See e.g. Louis Henkin, *Infallibility under Law: Constitutional Balancing*, 78 COLUMBIA LAW REVIEW 1022–1049, 1049 (1978): "[T]the Court has to begin to define and refine the weights it puts into balance, which rights have special weight, which needs are particularly compelling, so we can see that the scales are not being held blindly, irrationally." On balancing more generally, see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 THE YALE LAW JOURNAL 943–1005 (1987). For a critical comparison of the US and German approaches to balancing, see JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE (2013).

[57] The balancing approach was perhaps most visibly at work in Justice Souter's opinion in *Garamendi*, where he expressly weighed the federal government's interests against those of the state of California. In this calculation, the national interest in seeing the federal government's foreign policy safeguarded trumped the interests of the state of California, Souter considered – interests which in any case collided, as both California and the federal government ultimately strived to see Holocaust victims compensated for their suffering. See *American Insurance Association v Garamendi*, 539 US 396 (2003), 420-427.

[58] Ernest Young made an argument of this type when he argued that in the sphere of foreign relations, dual federalism is still alive. See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 THE GEORGE WASHINGTON LAW REVIEW 139 (2001).

> monarchy. It is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty.[59]

The argument is valid with regard to the federal-state relationship as well. Functionalism structurally favors the federal government over the states; it is not clear, as a matter of constitutional interpretation, what space remains for the states to engage in relations with foreign powers.

On the other hand, however, it is important to be mindful of the fact that the framework within which the Court undertakes its analysis nonetheless is one within which state action is authorized in principle, and in which restrictions on this authorization must be justified, either on Supremacy Clause or other grounds.[60] Abstraction made of the Constitution's explicit restrictions on state foreign policy, it is fair to say that only in rare events will Congress (by means of an express preemption provision) or the courts strike down a state law that touches on foreign relations. In any case, litigation would appear to be required to prevent states from engaging in activities the federal government considers unconstitutional.[61]

Louis Henkin summarized the US approach well when he held that '[d]espite careless, flat statements to the contrary, the foreign relations of the United States are not in fact wholly insulated from the states, are not conducted as though the United States were a unitary state.'[62] In fact, the federal-state relationship is characterized by jurisdictional overlaps rather than by exclusivity, as well as a pragmatic tolerance towards state activities that affect the nation's foreign policy. This tolerance is visible not only in high profile events such as the participation of California in the cap-and-trade emissions trading scheme set up by the

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[59] *Zivotofsky v Kerry ('Zivotofsky II')*, 576 U. S. ____ (2015), Scalia J dissenting, pp 14-15.

[60] In particular the prohibition on State treaty-making in Article I §10 Cl 3 of the US Constitution.

[61] Duncan Hollis has drawn attention to the proliferation of non-binding agreements between state and foreign governments. Even though the Foreign Compact Clause appears to require Congressional consent for such agreements, Congress is rarely ever involved, and states usually conclude agreements without involving the federal government. Hollis objects against this practice, and argues that substantial arguments exist for subjecting all such agreements – legal and non-legal – to supervision by the federal political branches (Hollis, *supra* note 41 at 745.).

[62] LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 150 (2nd ed. ed. 1996). Similarly, see Young, *supra* note 47 at 340: "The truth is that, in our constitutional system of both horizontal and vertical separation of powers, it is virtually impossible for the United States actually to speak 'with one voice'—in foreign relations or otherwise"; GLENNON AND SLOANE, *supra* note 42 at 88, considering it a mistake to think that the Constitution excludes the states from foreign affairs; Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AMERICAN JOURNAL OF INTERNATIONAL LAW 821 e.s. (1989); Sarah H. Cleveland, *Crosby and the One-Voice Myth in US Foreign Relations*, 46 VILLANOVA LAW REVIEW 975, 975 (2001): "Congress and the President have full power to expressly pre-empt state and local interference with foreign affairs, and they have exercised that power on occasion. But even more often they have tolerated, deferred to or even encouraged state and local measures impacting on foreign affairs."

Canadian province of Quebec[63], but also in the hundreds if not thousands of low profile interactions that take place between state governments and third country governments, and which neither Congress nor the courts have the willingness nor the ability to restrict.[64]

At the same time, it is important to be mindful of the limits of this tolerance. Be it by relying on *Curtiss-Wright* and the theory of a 'plenary' federal foreign affairs power which this ruling has come to represent, or through a preemption analysis with functionalist undertones, the supremacy of the federal government in the sphere of foreign relations is uncontested in the US.[65] Unlike in the domestic context, where the federal government can pre-empt state law only through the adoption of a statute, per *Zschernig*, in the sphere of foreign relations a federal executive policy can trigger the same effect.[66] As Sarah Cleveland has argued: 'Congress and the President have full power to expressly pre-empt state and local interference with foreign affairs, and they have exercised that power on occasion. But even more often they have tolerated, deferred to or even encouraged state and local measures impacting on foreign affairs.'[67]

It is clear, then, that the federal-state relationship in the US remains characterized by hierarchy, not equality, and certainly not by a form of pluralism as is the case in the European context.[68] States undertake evermore international actions, either directly or indirectly, but the constitutionality of these actions depends on the terms of federal foreign policy and the federal government's response to these actions. In this sense, the Madisonian paradigm of 'external unity, internal diversity' remains firmly in place in the US.

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[63] On the Western Climate Initiative, see http://www.wci-inc.org/index.php <accessed 25 February 2017>.

[64] Describing these activities, see generally GLENNON AND SLOANE, *supra* note 42 at ch 2. On the rise of compacts between state and third country governments adopted without Congressional approval, see Hollis, *supra* note 41.

[65] See, however, the late Justice Scalia's dissenting opinion in *Arizona v US*, where he criticized the majority's opinion for its failure to respect the sovereign rights of the state of Arizona. See *Arizona v US*, 567 U. S. ____ (2012), Scalia J dissenting, p 1: 'Today's opinion … deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there.' On the 'anti-federalist' counter-tradition in the US and its enduring influence, see generally ELVIN T. LIM, THE LOVERS' QUARREL: THE TWO FOUNDINGS AND AMERICAN POLITICAL DEVELOPMENT (1 edition ed. 2014).

[66] See *Zschernig*, where the Oregon statute was pre-empted for interference with the federal government's foreign policy towards East-Germany.

[67] Cleveland, *supra* note 62 at 975.

[68] See below.

FEDERALISM AND FOREIGN RELATIONS IN THE EUROPEAN UNION: EUROPE'S PLURALIST PREDICAMENT

How is the EU-Member State relationship structured in the sphere of foreign relations? Whereas the constitutional landscape in the US is characterized by hierarchy, in the EU it is characterized by pluralism, in the sense that the terms of the relationship between the EU and the Member States is the product not of compliance by all parties with the constitutional rules and principles as interpreted by the federal umpire (in this case, the ECJ), but rather as the product of a confrontation between two different conceptions of the nature of the European integration project which stand in tension with one another. One such conception is shared by the supranational institutions. It understands the EU as a unified institutional actor with independent agency on the international stage. Loïc Azoulai has referred to this conception as one of 'integrative institutionalism'[69]; others have referred to it as the 'integration through law' paradigm[70]; yet others, including the ECJ, refer to it as the 'constitutional' paradigm, understood here in a narrow sense as implying a hierarchical relationship between the EU and its Member States.[71] Azoulai defined this paradigm as it plays out in the foreign relations context as follows:

> This vision [of integrative institutionalism] is based on a basic idea of what is, constitutionally speaking, *une certaine idée de l'Europe*, and is meant to rebut competing visions that tend to reduce the Union to a contractual arrangement. It postulates the absolute precedence of the Union's institutional framework in the conduct of external action within the ambit of EU law. This is justified firstly by a concern about the consistency and credibility of the EU in the international arena. It is crucial that the EU seeks to function and to represent itself to the outside world as a unified system even in areas of shared competence. Moreover, by requiring the involvement of the supra-national organs with their own independent authority in international negotiations, the Court assumes that the common interests will be properly defended.[72]

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[69] See Loïc Azoulai, *The Many Visions of Europe. Insights from the Reasoning of the European Court of Justice in External Relations Law*, *in* THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS: CONSTITUTIONAL CHALLENGES 165–182, 176–179 (Marise Cremona & Anne Thies eds., 2014).

[70] See seminally PIERRE PESCATORE, LE DROIT DE L'INTÉGRATION: ÉMERGENCE D'UN PHÉNOMÈNE NOUVEAU DANS LES RELATIONS INTERNATIONALES SELON L'EXPÉRIENCE DES COMMUNAUTÉS EUROPÉENNES (Sijthoff ed. 1972).

[71] See seminally Judgment in *Parti écologiste "Les Verts" v Parliament*, C-294/83, para. 25, where the ECJ refers to the EEC Treaty as the (then) EEC's 'constitutional charter.' The 'constitutional' paradigm was first articulated in Stein, *supra* note 25. For a recent defense, see KAARLO TUORI, EUROPEAN CONSTITUTIONALISM (2015).

[72] Azoulai, *supra* note 69 at 176. Internal quotation marks omitted.

The other conception is shared by many of the Member States. It envisages the EU as an contractual association consisting both of likeminded sovereign states and independent EU institutions.[73] This conception has been referred to as an 'associative institutionalist' understanding of the European integration process. Azoulai explains:

> Associative institutionalism manifests itself through rules of conduct imposed on Member States as well as on European institutions. In particular, a duty of close and loyal cooperation applies to the Union and the Member States exercising their powers in areas of exclusive or shared Union competence. This procedural framework amounts to a form of discipline that requires Member States to adopt a 'common attitude.'[74]

The latter conception finds support amongst many Member States as well as from the Council. Alan Dashwood, a former head of the legal service of the Council, for example, has referred to the EU as a 'constitutional order of sovereign states'[75] and understands the practice of concluding mixed agreements as a practical expression of this paradoxical nature as a polity somewhere in between a federal state and an intergovernmental organization.[76] In this sense, the associative institutionalist paradigm is reminiscent of the conception of the EU as a manifestation of 'constitutional pluralism', according to which the EU and its Member States are bound up together within a common constitutional structure within which their mutual relationship is characterized by heterarchy not hierarchy.[77]

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[73] This does not make the association intergovernmental in nature. In contrast to intergovernmental theories, which characterize the relationship between the Member States and the EU institutions in principal-agent terms (see e.g. A. Moravcsik, *Preference and Power in the European Community: A Liberal Intergovernmentalist Approach*, *in* ECONOMIC AND POLITICAL INTEGRATION IN EUROPE : INTERNAL DYNAMICS AND GLOBAL CONTEXT (Simon Bulmer ed., 1994).), the 'associative institutionalist' conception recognizes that the EU institutions enjoy a meaningful degree of autonomy.

[74] Azoulai, *supra* note 69 at 179.

[75] A. Dashwood, *The relationship between the member states and the European union/European community*, 41 CMLR 355–381, 356 (2004).

[76] In this sense, see Alan Dashwood, *Why Continue to have Mixed Agreements at All?*, *in* LA COMMUNAUTÉ EUROPÉENNE ET LES ACCORDS MIXTES: QUELLES PERSPECTIVES? 93, 93 (Jacques H. J. Bourgeois, Jean-Louis Dewost, & Marie-Ange Gaiffe eds., 1997): "Mixed agreements are necessary because of the peculiar nature of the polity created by the Community and Union Treaties. That polity is founded on a paradox". The Member States have limited their sovereign rights under arrangements which the Court of Justice have described as a "constitutional charter'? ; and yet they retain the character of States in the eyes both of their international partners and of their own peoples'. In a similar sense, see Allan Rosas, *Mixed Union-Mixed Agreements*, *in* INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 125, 125 (Martti Koskenniemi ed., 1998): "[T]he European Union being a hybrid conglomerate situated somewhere between a State and an intergovernmental organisation, it is only natural that its external relations in general and treaty practice in particular should not be straightforward. The phenomenon of mixed agreements ... offers a telling illustration of the complex nature of the EU and the Communities as an international actor." With respect to both authors, the juxtaposition between a 'state' and an international organization demonstrates a form of dichotomous reasoning within which the genus of the 'federation' has no independent space of existence. For an effort to create such a space, see OLIVIER BEAUD, THÉORIE DE LA FÉDÉRATION (2007).

[77] In this sense, see Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the*

This section first unpacks both conceptions by exploring their legal expressions. The section first examines the ECJ case law on the relationship between the EU and its Member States in the context of foreign relations, and then explores the competing understanding of the constitutional framework that influences institutional practice. As a preliminary note, it is important to emphasize that in the EU context, both the EU and its Member States hold certain treaty-making powers, and in this sense thus project the internal diversity that characterizes the EU onto the international stage. It follows that, unlike in the US, 'federalism' issues present themselves with a particular urgency in the context of EU foreign relations: not only the effectiveness of EU foreign policy is at risk, e.g. through the adoption of a statute by an individual state; also the legitimate interests of third countries need to be taken into account when addressing 'federalism' questions.[78]

The 'integrative institutionalist' or 'constitutional' paradigm

In a line of case law reaching back to the 1970s, the ECJ has articulated a doctrine of exclusive EU powers to engage in foreign relations. In a fashion reminiscent of the categorical approach at work in early US Supreme Court rulings, the ECJ in these cases identified areas within which the EU enjoys an exclusive power to act internationally.

The case law in this area has two strands. A first strand reaches back to the 1971 *ERTA* case, in which the ECJ introduced the principle – now codified in Article 3(2) TFEU – that the EU acquires an exclusive power to conclude international agreements in so far as the conclusion of a particular agreement may affect common rules or alter their scope.[79] The scope of application of what became known as the 'ERTA principle' has been contested.[80] In recent case law, the ECJ maintains that if an international agreement is to be concluded on a subject

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United States, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 326–355 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

[78] This difference does not render a comparison between the EU and the US fruitless, however. As Gutman and De Baere have argued: '[W]hen delving into the relevant case law and the respective constitutional arrangements governing international relations in the EU and the US, the analogies may not be exact. Arguably, however, this is not fatal to the comparative analysis undertaken here, since despite differences in federal structure, both legal orders are nonetheless faced with the common problem inherent to federalism concerning how to balance the need to ensure a coherent international relations policy at the central level and the allowance for a certain degree of autonomy of the constituent entities to act in the international relations field in order to protect their own interests.' See De Baere and Gutman, *supra* note 22 at 137.

[79] Judgment in *Commission v Council ('ERTA')*, C-22/70.

[80] For an early analysis of this contestation, see M. Waelbroeck, *The Emergent Doctrine of Community Pre-emption -- Consent and Re-delegation*, *in* COURTS AND FREE MARKETS. VOLUME II. 548–580 (Terrance Sandalow & Eric Stein eds., 1982), in particular 551-552. For a more recent analysis, see Thomas Verellen, *The ERTA Doctrine in the Post-Lisbon Era*, 21 COLUMBIA JOURNAL OF EUROPEAN LAW 383–410 (2015).

matter which falls within an 'area' that is 'largely covered' by common EU rules – typically internal EU rules – the EU holds an exclusive competence to conclude the agreement. For example, in the recent ECJ opinion on the nature of the competence of the EU to conclude the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, the ECJ held that since the area affected by the Treaty had been harmonized to an important extent by means of internal EU legislation, the 'area' within which the Marrakesh Treaty falls is 'largely covered' in the meaning of the ERTA principle.[81] It follows that only the EU has the necessary competence to conclude the agreement, and that the Member States are precluded from becoming a Contracting Party in their own right.

A second strand was articulated most forcefully in Opinion 1/75, where the ECJ held that the power of the EU to conduct a common commercial policy is exclusive in nature.[82] For to argue otherwise, the Court held, 'would amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.'[83] The scope of the EU's exclusive competence to conduct a common commercial policy has been a contentious issue in EU law.[84] In *Daiichi Sankyo*, the ECJ was again confronted with the question. The case revolved around the question of whether the 'commercial aspects of intellectual property' as addressed in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) fell within the scope of the EU's exclusive CCP competence, as codified in Article 207 TFEU. The ECJ ruled that TRIPs did fall within the scope of the CCP, as the rules on intellectual property rights in that agreement were 'related specifically to international trade', in the sense that they 'essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade.'[85] In *Daiichi*

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[81] Opinion 3/15 ('Marrakesh Treaty').

[82] Opinion 1/75 ('Understanding on a Local Cost Standard').

[83] Opinion 1/75, p 1364.

[84] For an early analysis, see e.g. Ulrich Everling, *Legal Problems of the Common Commercial Policy in the European Economic Community*, 4 COMMON MARKET LAW REVIEW 141–165 (1967).

[85] *Daiichi Sankyo*, paras 51-53. Examining this ruling, see e.g. Joris Larik, *No mixed feelings: The post-lisbon common commercial policy in Daiichi Sankyo and Commission v. Council (Conditional Access Convention)*, 52 COMMON MARKET LAW REVIEW 779–799 (2015); Yole Tanghe, *The EU's External Competence in IP Matters: The Contribution of the Daiichi Sankyo Case to Cloudy Constitutional Concepts, Blurred Borders and the Corresponding Court Jurisdiction*, 22 COLUMBIA JOURNAL OF EUROPEAN LAW 139–163 (2015).

Sankyo the ECJ reaffirmed a broad reading of the scope of the EU's exclusive competence to conduct a common commercial policy.[86]

Both the ERTA principle and the doctrine of *a priori* exclusivity of which the case law on the common commercial policy is the most prominent manifestation serve to ensure that the 'full effectiveness' of EU law is ensured.[87] In the case of the ERTA principle, the main concern is to ensure that the Member States are not able, through the use of their powers as sovereign states under international law, to undermine or undo the commitments they have taken up within the EU framework by adopting EU legislation.[88] In this sense, the ERTA principle is introspective; it protects the internal *acquis communautaire*. In the case of the CCP, the aim is to protect the full effectiveness of the powers of the EU and the capacity of the EU institutions to engage in international trade relations. The doctrine of *a priori* exclusivity is thus more outward-looking, as it seeks to ensure that the EU is able to protect the 'common EU interest' on the international stage.[89]

It is important to have a clear grasp of the implications of both doctrines, which are potentially far-reaching. Two factors are relevant in this regard. First, the concept of an 'area largely covered' potentially empowers the EU to replace the Member States in a wide range of international negotiations. Much depends on how broadly the relevant 'area' is defined; at this point little clarity has been provided on this question, which leaves open the possibility for the ECJ to endorse a broad understanding of the term. Second, it is necessary to read

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[86] In a similar sense, see Judgment in *Commission v Council ('Conditional Access')*, C-137/12, where the ECJ ruled that the European Convention on the legal protection of services based on, or consisting of, conditional access had to be adopted on the basis of the EU's competence to conduct a common commercial policy, and not on the basis of the EU's competence over the internal market. *Conditional Access* together with *Daiichi* has been read as heralding a 'sea change' in the area of the CCP due to the Court's broad reading of the EU's exclusive competence. See Larik, *supra* note 85 at 798: "The combined effect of the judgments annotated represents a sea change in the area of the CCP. Each fully endorsed the expanded boundaries of exclusive Union competence based on the changes introduced by the Lisbon reform, ending two decades of mixed feelings in the relations of the EU and its Member States within the WTO and other trade-related areas following Opinion 1/94."

[87] See e.g. the *ERTA* judgment, para. 31: 'Community powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law.' In this sense, see also Marise Cremona, *EU External Relations: Unity and Conferral of Powers*, *in* THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION 65–85, 68 (Loïc Azoulai ed., 2014): "[T]he approach to both express and implied competence was based on conceptions of effectiveness and unity, and in the initial cases the Court assumes that unity requires a transfer of competence and therefore exclusivity."

[88] Ibid, para. 22: '[T]o the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.'

[89] The link between internal and external competences has been pointed out in Cremona, *supra* note 87 at 65.

together the ECJ's case law on the scope of the common commercial policy with a related line of case law on the choice of the substantive legal basis upon which the EU is required to act. Typically, this case law is invoked and relied upon in a context in which a disagreement exists between the EU institutions on the required decision-making procedures. There is no reason, however, to believe that this line of case law ought not to be applied also to assess the scope of the CCP, and thus the scope of the EU's exclusive competence.[90]

The doctrine of the choice of legal basis requires the EU legislator to select as few legal bases as possible when enacting a norm.[91] To do so, the legislator must identify the 'center of gravity' of a proposed act, such as a Council decision to start negotiations towards an international agreement, or a decision concluding such an agreement. 'Ancillary' or 'incidental' aspects of an agreement can in this way be 'absorbed' into the 'center of gravity' of the agreement. Here again, the logic of the ECJ's case law points towards a broad reading of the scope of the EU's competences, in this case its exclusive competence. The 'center of gravity' test can be understood as the functional equivalent of the 'area largely covered' test at work in the framework of the ERTA case law. In both instances, the ECJ has articulated a potentially far-reaching exclusive competence for the EU to act on the international stage.

The ECJ's case law is grounded in Azoulai's 'integrative institutionalist' conception of the EU-Member State relationship, as the recognition of an exclusive competence for the EU to act precludes the Member States from acting on the international stage. Instead, they are required to act within and through the EU institutions, in particular the European Council and the Council, and in accordance with the decision-making procedures set out in the Treaties, which confer significant powers also to the supranational institutions. These procedures diverge from traditional international legal practice, where decisions must generally be taken

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[90] As Advocate General Wahl argued in the recent Opinion 3/15, to identify the nature of the EU's competence, it is necessary, first, to determine whether an EU competence exists. To make this assessment it is necessary 'to identify the correct substantive legal basis (or bases) for the decision at issue. In the system created by the EU treaties, which is based on the principle of conferral, the choice of the correct legal basis for a proposed act by the institutions is of constitutional significance. That choice determines whether the Union has the power to act, for what purposes it may act and the procedure that it will have to follow in the event that it may act.' See Opinion AG Wahl in Opinion 3/15, paras 30-31. The AG went on to determine whether Article 207 TFEU (on the CCP) could be relied on as the only substantive legal basis upon which to conclude the Marrakesh Treaty, or whether other legal bases were required to supplement Article 207 TFEU. Supporting an application of the 'center of gravity' test to questions involving the nature of EU competence, see also Fernando Castillo de la Torre, *The Court of Justice and External Competences After Lisbon: Some Reflections on the Latest Case Law*, *in* THE EUROPEAN UNION'S EXTERNAL ACTION IN TIMES OF CRISIS 129–186, 184 (Piet Eeckhout & Manual Lopez-Escudero eds., 2016).: 'It has been often argued that the approach of predominant/incidental or principal and ancillary applies between legal bases, but not in the horizontal division of competences between the EU and its Member States.'

[91] For a summary of the approach to be followed, see Opinion AG Wahl in Opinion 3/15, paras 30-34.

by unanimity in order to protect the equality of states, which remains a fundamental principle of international law. Within a strictly EU framework, as opposed to a 'hybrid' mixed framework[92], decision-making most often takes place by means of qualified majority voting, typically coupled with a requirement of consent by the European Parliament.

Despite flirtations with what Loïc Azoulai has referred to as 'associative institutionalism' – i.e. a conception of the nature of the EU-Member State relationship in which institutions remain important, but in which the objective is no longer to require the Member States to act through the EU institutions, but rather to ensure that they act jointly with the EU on the international stage[93] – it is tentatively suggested that the ECJ today has returned to the 'integrative institutionalist' paradigm which characterized its early case law in this area. Characteristic of this paradigm is the Court's willingness to recognize exclusive competences, typically on the basis of the ERTA principle.[94]

The 'associative institutionalist' or 'constitutional pluralist' paradigm

The ECJ's emphasis on articulating a broad reading of the EU's exclusive competences stands in tension with the reading of the Treaty framework defended by the Council and most of the

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[92] On the difficulties involved in maintaining the full effectiveness of the EU's decision-making rules, see Thomas Verellen, *On Hybrid Decisions Mixed Agreements and the Limits of the New Legal Order: Commission v Council ('US Air Transport Agreement')*, 53 COMMON MARKET LAW REVIEW 741–762 (2016).

[93] Of particular relevance in this regard are, on the one hand, the cases in which the ECJ, confusingly, declared the EU and its Member States 'jointly' competent to conclude an agreement (see in particular Opinion 2/91 ('ILO Convention') and Opinion 1/94 ('WTO'), and, on the other hand, the line of case law in which the ECJ doctrinally developed the concept of a 'duty of sincere cooperation' (see in particular Judgment in *Commission v Sweden ('PFOS')*, C-246/07). This 'associative' turn has been taken up enthusiastically by commentators. See e.g. Eleftheria Neframi, *The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*, 47 COMMON MARKET LAW REVIEW 323–359 (2010); Christophe Hillion, *Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation," in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 87–115, 87 (Christophe Hillion & Panos Koutrakos eds., 2010), speaking of the "polyphonic nature of the Union's external action."

[94] See most recently Opinion 3/15 ('Marrakesh Treaty') where the ECJ recognized ERTA-type exclusivity with regard to the entire international agreement. In a similar sense, see also Opinion 1/13 ('Hague Convention') and the judgment in *Neighboring Rights* (C-114/12). In both instances, the ECJ recognized ERTA-type exclusivity, drawing on the precedent established in Opinion 2/91 ('ILO Convention No 170') where the ECJ recognized that ERTA-type exclusivity can arise if an 'area' is 'largely covered' by common EU rules. For a critical analysis of this line of case law, see Verellen, *supra* note 80, highlighting the tension in the Court's case law between the "area largely covered" line of reasoning and the competing emphasis on the need for a "comprehensive and detailed analysis" of the relationship between the proposed international agreement and pre-existing common EU rules. For a recent in-depth analysis, see also Amedeo Arena, *Exercise of EU Competences and Pre-emption of Member States' Powers in the Internal and the External Sphere: Towards "Grand Unification"?*, YEARBOOK OF EUROPEAN LAW 1–78 (2016). The forthcoming ECJ opinion on the nature of the EU's competence to conclude a trade agreement with Singapore will be an important test case in this regard. It remains to be seen whether the ECJ will retain its emphasis on exclusivity and a broad reading of the competences of the EU also when reviewing a particularly broadly framed trade agreement, which, moreover, has been subject to political contestation. See Opinion 2/15, pending. Advocate General Sharpston advised the Court against recognizing full exclusivity. See Opinion AG Sharpston in Opinion 2/15.

Member States.[95] On two issues in particular they defend a reading of the Treaties that stands in tension if not conflict with the ECJ's case law introduced in the above: first, on the issue of the scope of the ERTA principle and, second, on the issue of the nature of the EU's shared competences. On both issues the Council and several Member States defend views that are difficult to reconcile with the Treaties as interpreted by the ECJ. Taken together, the Council and Member State position on both of these issues serves to ensure that the EU remains unable to act independently on the international stage and instead remains required to act 'jointly' with the Member States, in the sense that when making a treaty, not only the EU, but also the Member States must become a Contracting Party to the agreement. Both issues will be briefly unpacked.

(a) ***The scope of the ERTA principle***

Against the 'area largely covered' approach favored by the ECJ, the Member States defend what a member of the legal service of the Commission recently referred to as an 'atomistic' approach.[96] Under this approach, it is necessary to determine for each individual provision of an international agreement whether it affects common EU rules or alters their scope in the meaning of the ERTA principle. Despite the ECJ's rejection of this approach in its post-Lisbon case law, Member States continue to defend it. In the recent Opinion 3/15 on the Marrakesh Treaty, for example, several Member State governments advanced arguments that relied on the premise that an ERTA effect must be determined on a provision-by-provision basis. For example, they considered that the provision of a possibility for Member States to provide for exceptions or limitations to EU copyright rules implies that with regard to the provisions of the Marrakesh Treaty which render obligatory the provision of such exceptions or limitations, no ERTA effect has occurred and the Member States instead have 'retained' a competence to act internationally. The ECJ did not follow the Member States, and instead ruled that the area was 'largely covered' by common EU rules. This implied that no provision-specific analysis was required.[97]

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[95] The tension between constitutional principle and institutional practice has been pointed out also in Cremona, *supra* note 87 at 74–80.

[96] Castillo de la Torre, *supra* note 90 at 163. The tension between both approaches has first been identified in Waelbroeck, *supra* note 80 at 551–552.

[97] For an analysis, see Thomas Verellen, OPINION 3/15 ON THE MARRAKESH TREATY: ECJ REAFFIRMS NARROW "MINIMUM HARMONISATION" EXCEPTION TO ERTA PRINCIPLE EUROPEAN LAW BLOG (2017), http://europeanlawblog.eu/2017/03/01/opinion-315-on-the-marrakesh-treaty-ecj-reaffirms-narrow-minimum-harmonisation-

In the *Neighboring Rights* case, on the nature of the EU's competence to conclude an international agreement on the protection of the neighboring rights of broadcasting organizations, Advocate General Sharpston had adopted a similarly 'atomistic' approach, leading her to engage in a lengthy, detailed analysis of the provisions of the proposed international agreement.[98] This analysis eventually led her to conclude that for most aspects of the agreement, the EU had acquired an exclusive competence on the basis of the ERTA principle, but not for all. As the lack of exclusive competence for one provision implies that the entire agreement must be subjected to Member State approval, the proposed agreement in AG Sharpston's view ought to have been concluded as a mixed agreement.[99] The ECJ did not agree, however. It considered instead that the subject matter of the international agreement 'falls within an area covered to a large extent by common EU rules and that those negotiations may affect common EU rules or alter their scope.'[100] It followed that the entire agreement fell within the scope of the EU's exclusive competence, and that therefore the Member states had been precluded from joining the agreement as a Contracting Party.

(b) ***The nature of shared competences***

The Member State emphasis on reading narrowly the exclusive competences of the EU goes hand in hand with an insistence on the essentially political nature of the decision of the Council *not* to exercise the EU's shared competences for part of a proposed international agreement, even if this agreement in its entirety falls within the scope of the EU's shared competences. As two members of the legal service of the Council recently argued:

> [T]he practice of the Council has shown an attachment to the literal meaning of the provisions of the Treaty of Lisbon, reflecting the views of most (and on occasion all) Member States that any competence not yet exercised by the Union, even for specific aspects in a field largely regulated by the Union, remains with the Member States and that it is an entirely discretionary

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exception-to-erta-principle/ (last visited Mar 30, 2017).

[98] Opinion of AG Sharpston in *Commission v Council ('Neighboring Rights')*, C-114/12.

[99] Advocate General Kokott made this point in her opinion in the *Vietnam* case, where she held that '[j]ust as a little drop of pastis can turn a glass of water milky, individual provisions, however secondary, in an international agreement … can make it necessary to conclude a shared agreement.' See Opinion of AG Kokott in *Commission v Council ('Vietnam')*, C-13/07, para. 121.

[100] Judgment in *Commission v Council ('Neighboring Rights')*, C-114/12, para. 102.

> and political choice whether in any given case the Union chooses to exercise a shared competence, or not to do so.[101]

By maintaining this position – the legality of which thus far has not been tested before the ECJ – the Member States are able to ensure that most international agreements take the form of a mixed agreement. This, in turn, ensures that Member States retain full control over the EU decision-making process, as it reintroduces international law, and thus unanimity, into the equation.

As with the Member States' insistence on the 'atomistic' reading of the ERTA principle, their insistence on the political nature of the decision not to exercise the EU's shared competence with regard to as little as a single provision of an international agreement runs counter the spirit of the Treaty framework as interpreted by the ECJ and, in any case, is at odds with the 'integrative institutionalist' understanding of the European integration project. In doctrinal terms, the issue is the absence of a well-developed concept of shared competence in EU law, in particular in the sphere of EU foreign relations law. Part of the difficulty stems from the widespread yet erroneous belief that if a competence is 'shared' some parts of the competence rest with the Member States while other parts rest with the EU, and that consequently action by both the EU and its Member States is required if international action is to be undertaken.[102] This view runs counter the text of the Treaties, which in Article 2(2) TFEU provides that

> [w]hen the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Put differently, the Treaties understand 'shared' competence in a similar way as does the German Basic Law, i.e. as concurrent, rather than parallel competences. This means, in

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[101] Gosalbo-Bono and Naert, *supra* note 2 at 23. In the same sense, see e.g. J. HELISKOSKI, MIXED AGREEMENTS AS A TECHNIQUE FOR ORGANIZING THE INTERNATIONAL RELATIONS OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES 42 (2001).

[102] The situation in which EU shared competence covers a proposed international agreement in its entirety ought to be distinguished from the situation in which the EU lacks any competence to act. In this type of circumstance, recourse to the technique of the mixed agreement is necessary. The distinction has been referred as one between obligatory and facultative mixity. On this distinction, see Rafael Leal-Arcas, *The European Community and Mixed Agreements*, 6 EUROPEAN FOREIGN AFFAIRS REVIEW 483–513, 494 (2001).

particular, that while both orders of government have a power to act within the same sphere, in principle they cannot act jointly, and one can only act in so far as the other has not acted.[103]

To this observation must be added another one. It is difficult to see how the practice of not exercising the EU's shared competence with regard to, in extreme cases, a single provision can be reconciled with the requirement that EU norms (both internal and external) must be adopted on the basis of a legal basis that corresponds with the 'center of gravity' of the proposed norm or international agreement. For it follows from the requirement that decisions are to be adopted on the basis of the legal basis corresponding to their center of gravity that ancillary or incidental aspects of the decision (and by extension, in the context of foreign relations, an international agreement) do not play a role in the overall division of competences assessment.

This observation, coupled with the fact that shared competences ought to be understood as concurrent competences, supports the view that within the sphere of the EU's shared competence, Member States cannot act when the EU acts.[104] Consequently, if the Member States cannot act, the Council must act, as it cannot have been the intention of the Treaty Framers that neither party is empowered to act. 'Facultative' mixity, then, arguably is incompatible with the Treaties.

(c) ***Europe's pluralist predicament***

Despite the tension between the reading of the Treaty framework articulated by the ECJ, institutional practice stays fairly close to the interpretation of that framework defended by the Council and the Member States. It is not difficult to see why: as the Commission and the Parliament cannot on every occasion bring a matter before the ECJ, the decision of the Member States within the Council on the format of the EU's participation in international negotiations is in many if not most instances final. In this sense, not unlike the situation in the United States, where the position of the executive branch on the scope of its own powers is

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[103] For an argument in this sense in a closely related context, see Opinion of AG Kokott in *Commission v Council ('Vietnam')*, C-13/07, paras 75-76.

[104] The contentious issue in this regard is how broadly one ought to define the area within which the EU acts. In the Member States' view, individual provisions constitute the relevant 'area.' A reading of the ECJ's case law on the ERTA principle and the choice of legal basis, however, support the view that the relevant area is the area covered by the proposed international action.

for practical purposes authoritative[105], the Council in the EU framework is to an important extent the master of the scope of its own competence.[106]

Member State insistence on the abovementioned 'atomistic' reading of the EU's competences places the supranational institutions (in particular the Commission, but increasingly also the European Parliament[107]) in a difficult position. On the one hand, their reading of the Treaty framework requires them to object against the Council's narrow reading of the EU's competences. On the other hand, to insist too strongly creates a risk of non-compliance with ECJ rulings.[108] In this sense, the delicate dance that takes place between the Member States and the Council on the one hand, and the Commission, Parliament and the ECJ on the other is reminiscent of the 'pluralist' dance that takes places between the ECJ and the high courts of the Member States.[109] In both contexts, the ECJ and the Member State actors – high courts and executives – are compelled to engage in a process of mutual accommodation.

This process of mutual accommodation takes the form of a policy of allegedly constructive ambiguity on certain aspects of the EU constitutional landscape.[110] Such constructive ambiguity is visible most clearly with regard to the issue of the nature of the EU's shared

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[105] Harold Koh famously argued that 'in foreign affairs the President (almost) always wins' (see Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 THE YALE LAW JOURNAL 1255–1342 (1988).).

[106] Many decades ago, John Costonis already warned against the pernicious consequences of having the Council define the scope of its own competences by having the Council decide on the appropriateness of mixity. See John J. Costonis, *The Treaty-Making Power of the European Economic Community: The Perspectives of a Decade*, 5 COMMON MARKET LAW REVIEW 421–457, 452 (1968): "Substituting the Council for the Community Court as the agency that passes on the compatibility of a proposed accord with the Rome Treaty, is like having the wolves guard the sheep. Properly concerned under the best of circumstances with representing and defending the interests of the member states, the Council is subject to a severe institutional bias to construe the Community"s powers as narrowly as possible. Further, the Council's decisions, which are taken behind closed doors and are generally responsive to highly political forces, hardly provide a solid basis upon which to build a harmonious body of precedents and doctrine regarding the ambit of the Community's treaty-making powers'.

[107] On the role of the European Parliament in the treaty-making process, see generally Riccardo Passos, *Mixed Agreements from the Perspective of the European Parliament.*, *in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 231–248 (Christophe Hillion & Panos Koutrakos eds., 2010).

[108] Warning against this risk, see Gosalbo-Bono and Naert, *supra* note 2 at 26: "[I]t appears doubtful that the Council and its Member States will change their position about mixity, a practice that, reinforced with provisional application, is founded on the fundamental principle of conferral and which in their view has proven to be very useful."

[109] On constitutional pluralism in the judicial setting, see the contributions in JAN KOMAREK & MATEJ AVBELJ, CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (2012). The theory was first articulated in NEIL MACCORMICK, QUESTIONING SOVEREIGNTY (2001).

[110] On the usefulness of such constructive ambiguity, see generally MICHAEL FOLEY, THE SILENCE OF CONSTITUTIONS (ROUTLEDGE REVIVALS): GAPS, "ABEYANCES" AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT xi (2013), defining an abeyance as "a form of tacit and instinctive agreement to condone, and even cultivate, constitutional ambiguity as an acceptable strategy for resolving conflict."

competence.[111] It is indeed remarkable that in the several decades of litigation on the division of competences between the EU and its Member States in the sphere of foreign relations, the Commission has never requested the Court to rule on the precise meaning of 'shared competence' in the external sphere.[112] At the same time, it is remarkable that the ECJ has not tackled the issue on its own initiative. Instead, most stakeholders have avoided the issue, and have instead focused on clarifying the scope of the EU's exclusive competences.[113]

This 'black box' can be understood as the battlefield of systemic (as opposed to constitutional) pluralism in the sphere of foreign relations. The Commission and the Council maintain conflicting positions, yet no occasion has arisen in which the Commission (or the Parliament) has directly challenged the Council's interpretation of the nature of shared competences.[114] Yet, this constructive ambiguity is not neutral, as in practice the position of the Member States prevails, and the EU must in most instances act 'jointly' with the Member States on the international stage.[115] In this sense, the dynamic at work in the foreign relations context leads to the opposite result compared to the judicial context, where despite Member State high courts' objections against the primacy of EU law, as a practical matter they do apply the principle, and do comply with the rulings of the ECJ.[116] Put differently, the costs for

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[111] The very instrument of the mixed agreement is, however, a mechanism to protect ambiguity. In this sense, see e.g. on the rationale of mixity: Geert De Baere, *EU External Action*, *in* EUROPEAN UNION LAW 704–750, 738 (Catherine Barnard & Steve Peers eds., 2014): "Their lack of clarity as to the precise vertical division of competences makes mixed agreements suitable for enabling the Union to act internationally while keeping the competence situation sufficiently vague so as not to affect openly the Member States" external competences'.

[112] Note, however, that de la Torre suggests that this might change. See Castillo de la Torre, *supra* note 90 at 186: "The next step should be the definition of the conditions of exercise and the legal consequences of shared competences. It may come sooner than expected."

[113] Note, however, that the ECJ in a number of rulings has given an implicit blessing to the practice of concluding mixed agreements. In this sense, see Christiaan W. A. Timmermans, *The Court of Justice and Mixed Agreements*, *in* THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW - LA COUR DE JUSTICE ET LA CONSTRUCTION DE L'EUROPE: ANALYSES ET PERSPECTIVES DE SOIXANTE ANS DE JURISPRUDENCE 659–673, 663 (Court of Justice of the European Union ed., 2013), http://link.springer.com/chapter/10.1007/978-90-6704-897-2_35 (last visited Feb 1, 2015): "If ... mixed agreements are attractive for Member States, it might also be said that the Court has considerably contributed to enabling their success."

[114] It is noteworthy that in the *US Air Transort Agreement* case, the Commission expressly refrained from challenging the choice for mixity. See Judgment in *US Air Transport Agreement*, para. 46: 'In the present case, it is not in dispute that the Accession Agreement and the Ancillary Agreement are mixed agreements.'

[115] In 2010, Ricardo Passos wrote that 'the potential treaty-making power of the Union is seldom resorted to in order to conclude a pure Union agreement. Indeed, most of the 250 mixed agreements in force are examples of 'voluntary mixity' (voluntary on the side of the Member States, because they want it).' See Passos, *supra* note 107 at 282.

[116] See, however, the recent ruling by the Danish Supreme Court in which it refused to disapply a Danish statute considered by the ECJ as standing in conflict with the principle of non-discrimination on the grounds of age, which the ECJ had recognized as a general principle of EU law. On the confrontation between the Danish Supreme Court and the ECJ, see Sune Klinge, EU LAW ANALYSIS: DIALOGUE OR DISOBEDIENCE BETWEEN THE EUROPEAN COURT OF JUSTICE AND THE DANISH CONSTITUTIONAL COURT? THE DANISH SUPREME COURT CHALLENGES THE MANGOLD-PRINCIPLE EU LAW ANALYSIS (2016), http://eulawanalysis.blogspot.com/2016/12/dialogue-or-disobedience-between.html (last visited Mar 25, 2017). For similar

the EU of accommodating Member States' insistence on state sovereignty are higher in the foreign relations context than they are in the internal, judicial context: whereas in the latter pluralism favors the EU, in the latter context it favors the Member States.

COMPARATIVE REFLECTIONS: HIERARCHY VERSUS PLURALISM, AND THE PERILS OF 'AS IF' CONSTITUTIONALISM

The constitutional landscape that emerges from the analysis in this paper is thus radically different in the United States and the European Union. As described, in the US, individual states can to some extent engage in foreign relations broadly understood. Yet, in constitutional terms, their ability to do so is limited, as they act within a constitutional framework which unambiguously endorses the supremacy of the foreign policy of the federal government. State autonomy is thus always precarious in the United States, and depends on the degree of federal tolerance *vis-à-vis* state international activities.

In the EU context, the constitutional landscape is rather different. Surely, one similarity must be acknowledged: both in the US and the EU, the 'federal' (or EU) order of governance articulates a claim to supremacy within the sphere of foreign relations. Initially, in both polities this claim took the form of a doctrine of exclusive powers, under which within certain areas only the 'federal' (or EU) order of governance was empowered to act. In a later stage, in the US context this categorical approach was replaced with a reliance on preemption principles, which, however, did maintain strong functionalist undertones favoring the supremacy of federal foreign policy. However, while in the US this claim to supremacy is uncontested, in the EU it remains the object of contestation by the member units of the compound EU polity in the ways described in the above.

This difference raises a question: ought the present pluralist predicament be maintained, or ought a clear choice to be made between the two competing conceptions of the EU-Member State relationship – the integrative institutionalist/constitutional conception on the one hand, and the associative/constitutional pluralist conception on the other? Should the Commission further pursue its legal strategy of trying to persuade the ECJ to articulate a broad reading of the EU's exclusive powers in the sphere of foreign relations? Ought it perhaps invite the ECJ

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difficulties in the Czech Republic, see also Zdenek Kühn, *Ultra Vires Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts' Defiance of EU Law*, 23 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 185–194 (2016).

to articulate its view on the nature of shared competences? Or ought it perhaps further pursue the strategy of persuading the Court to put further flesh on the notion of a 'duty of sincere cooperation', through which individual Member States would in some instances be under a legal obligation not to act on the international stage? Or, alternatively, ought some of these questions, as the Council suggests with its reference to the 'political' character of the decision to exercise shared competences, to be left to the political process?

The issue is brought in particular focus when it is examined against the backdrop of the functionalist arguments advanced in the US context in favor of federal supremacy over foreign relations. Such supremacy is typically justified on the basis of the consideration that an effective federal foreign policy is only possible within a framework within which the US speaks with one (read: a federal) voice. Clearly, in the EU as well, an argument could be made – as the ECJ did in fact make in Opinion 1/75, where the Court introduced the notion of a 'common EU interest' to justify the exclusive nature of the EU's competence over international trade – that the effectiveness of EU foreign relations would benefit if the Member States would be precluded from joining the EU in acting on the international stage. Undoubtedly, the effectiveness of EU decision-making would benefit if the EU would be able to act independently from the Member States on the basis of the procedures set out in the EU Treaties. Furthermore, as suggested in the above, persuasive legal arguments can be advanced in support of this proposition.

Yet, advancing such legal arguments perhaps is not a wise policy to pursue. As Justice Scalia alluded to in the fragment cited in the above, functionalism is not neutral. It is perhaps characteristic of the context of foreign relations that functionalist arguments presuppose a normative preference for one level of governance over the other, and that in the final analysis, a choice must be made between ensuring the effectiveness of the policies pursued by the federal or member unit governments. To demonstrate this point: in articulating a response to Russian aggression in Ukraine, a trade-off must be made between the EU policy of imposing economic sanctions on Russia on the one hand, and the policy individual Member States pursue of attracting Russian investment, for example in the field of nuclear energy.[117] To allow both policies to be pursued in parallel undermines the effectiveness of the EU's sanctions regime. In other words, acknowledging that to some extent something or someone

[117] Hungarian MPs approve Russia nuclear deal, BBC NEWS, February 6, 2014, http://www.bbc.com/news/world-europe-26072303 (last visited Apr 12, 2017).

has to give, is inevitable in some instances. In this sense, establishing the constitutional balance between the EU and its Member States, at least in the context of foreign relations, must at least in some instances be understood as a zero-sum game, which in turn requires that a normative choice be made between one level of governance and the other.[118]

The US experience can be helpful to take into account when reflecting on this issue. It can be helpful in two ways, with each way pointing in a different direction. On the one hand, the US experience lends support to the view that for a federation to be able to effectively defend its common interests in an international environment which is not always friendly towards that federation (as was the case in the early United States[119], and as is arguably currently the case in Europe[120]), it must be able to articulate and identify its common interests, and possess the necessary means – political, economic, fiscal as well as legal – to successfully pursue these interests.[121] As is well-recorded, the 1789 Constitution is itself the product of considerations of this type. It thus does not come as a surprise that throughout US constitutional history – in any case not since the Civil War-era[122] – the supremacy of the federal government in the sphere of foreign relations has not meaningfully been contested. The US constitutional

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[118] In this sense, see e.g. NYE, *supra* note 17 at 90, recognizing that interactions with foreign powers can be both zero- and positive-sum games. This viewpoint does not appear to be shared in the recent literature on EU foreign relations law, which appears to agree that the co-existence of 'multiple voices' is a strength, not a weakness. This in turn presupposes an understanding of international relations as perhaps overtly optimistic and involving nothing but positive-sum transactions. See e.g. Hillion, *supra* note 93 at 87.

[119] Foreign interference in the domestic affairs of the American Confederation was one of the driving forces behind the Philadelphia Convention and ultimately the adoption of the 1789 Constitution. On the difficulties the Confederation experienced in its dealings with foreign powers, see GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 ch 1 (1 edition ed. 2011).

[120] In this sense, see Charlemagne: Europe's ring of fire. The European Union's neighbourhood is more troubled than ever, THE ECONOMIST, September 20, 2014, http://www.economist.com/news/europe/21618846-european-unions-neighbourhood-more-troubled-ever-europes-ring-fire (last visited Mar 26, 2017). See also the recent analysis by Daniel Kelemen and Mitchell Orenstein, who argue that as EU foreign policy (in particular the common foreign and security policy) becomes more effective, hostile foreign powers increase (and successfully so) their efforts at developing leverage over weaker EU Member States. See Mitchell A. Orenstein & R. Daniel Kelemen, *Trojan Horses in EU Foreign Policy*, 55 JCMS: JOURNAL OF COMMON MARKET STUDIES 87–102 (2017).

[121] The federation must, in other words, be able to yield power on the international stage. On the concept of power, see NYE, *supra* note 17, arguing for a broad conception of power as including not only the ability to coerce others, but also to shape their preferences. It is fair to say that the EU historically has been strong with regard to the latter (see the literature on 'normative power Europe', e.g. R. WHITMAN, NORMATIVE POWER EUROPE: EMPIRICAL AND THEORETICAL PERSPECTIVES (2011).) but not very strong with regard to the former, with the EU's 'hard power' capabilities remaining very limited up until this day.

[122] In addition to the slavery question, the secession of the southern states was in part driven by foreign policy considerations, in particular diverging perspectives on free trade. Whereas the northern states favored the imposition of tariffs with the view of protecting domestic industries, the southern states favored free trade in order to ensure their continued access to foreign markets for their agricultural products. In this sense, the Civil War could be understood also as a radical contestation of the supremacy of the federal government over US foreign relations. On this aspect of the Civil War, see e.g. Marc-William Palen, *The Civil War's Forgotten Transatlantic Tariff Debate and the Confederacy's Free Trade Diplomacy*, 3 THE JOURNAL OF THE CIVIL WAR ERA 35–61 (2013).

experience in this sense is a useful reminder of precisely why unity in foreign relations is in itself an important value to protect.

On the other hand, however, the broader US experience also lends support to the view that there is only so much that the courts can or ought to achieve in contributing to the EU's efforts at speaking with one voice, and that indeed support for an effective 'federal' (EU) foreign policy requires support also from the political branches (in the EU context: the Council). It is uncontroversial to suggest that a reading of the US Constitution which leaves little room for the states to engage in foreign relations is very much in line with the spirit of that document. The origins of the Constitution, as documented e.g. in the *Federalist Papers*, lend support to this viewpoint. It follows that in the US context, the tension between the stakeholders – the federal government and the individual states – is much less pronounced. This is visible not only in what the Constitution has to say specifically on foreign relations – it only delegates powers to the federal government and only prohibits the states from undertaking certain actions – but also in the broader constitutional context within which the federal government operates. Of particular significance in this regard is the federal government's full fiscal independence from the individual states, as well as the fact that the US military is subject to federal as opposed to state control. These structural features of the US 'foreign affairs constitution' have contributed to the development of the federal government as the main driver of foreign policy in the United States, and have indeed allowed the US federal government to emerge out of World War II as the world's leading superpower.

In the EU context, which is so thoroughly legalized, it is tempting to lose structural factors such as these out of sight and rely instead – perhaps to an excessive extent – on the law and on litigation before the ECJ as a means to achieve constitutional cohesion. This does not mean that such structural considerations do not play a role in the case law of the ECJ, however. For example, it is clear that control by the Member States over much of the fiscal resources required to put into effect EU foreign policy has an impact on the balance of power between the EU and its Member States, including at the legal level.[123] This was visible, for example, in the context of Opinion 1/78, where the ECJ ruled that no exclusive EU competence could be

[123] The issue of the lack of independent EU fiscal resources has recently been placed on the political agenda by the publication of the so-called 'Monti Report.' See MARIO MONTI ET AL., FUTURE FINANCING OF THE EU. FINAL REPORT AND RECOMMENDATIONS OF THE HIGH LEVEL GROUP ON OWN RESOURCES DECEMBER 2016 (2017).

recognized for the establishment of a particular fund if that fund was to be financed with Member State resources.[124]

The point is, however, that structural factors such as the lack of independent fiscal resources and the absence of an integrated EU army are issues that cannot be resolved by the courts, or by means of legal argument more generally. They require Treaty amendment. However, for amendments to be adopted that would strengthen the EU's capacity to act effectively on the international stage, the project of European integration in general, and the project of developing the EU as an independent and effective foreign policy actor more specifically must enjoy sufficient political support. In particular, sufficient mutual trust must exist between the Member States on the one hand, and between the Member States and the EU institutions on the other, to allow the EU to develop a degree of independent agency, which in turn would increase its effectiveness on the international stage.[125]

The pluralist predicament is not desirable and, at least in the context of foreign relations, not sustainable. It is not necessary to share a Schmittian mind-set to draw this conclusion.[126] The performance of the EU on the international stage is less than optimal.[127] The high number of veto points in the EU decision-making process, in particular within a mixed framework, is an important explanatory factor for this sub-optimal performance, as the examples referred to in the introduction of this paper demonstrate. The 'Walloon crisis', for example, illustrates well how the EU's internal decision-making structures undermine its credibility as an international actor. Similarly, as Mitchel Orenstein and Daniel Kelemen have recently pointed out: even when the EU is able to take decisions, as it did by imposing economic sanctions on Russia

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[124] Opinion 1/78 ('International Agreement on Natural Rubber'), para. 62: 'If … the financing is to be by the Member States that will imply the participation of those States in the decision-making machinery or, at least, their agreement with regard to the arrangements for financing envisaged and consequently their participation in the agreement together with the Community. The exclusive competence of the Community could not be envisaged in such a case.'

[125] The ECJ is aware of the importance of mutual trust. See e.g. Opinion 2/13 ('Draft Accession Agreement of the EU to the ECHR'), para. 168: 'This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.'

[126] For Schmitt, federalism could not be reconciled with his unified, absolute conception of sovereignty. On the role of federalism in Schmitt's thought, see Nicolas Patrici, *Looking into Medusa's Eyes: Carl Schmitt on Federalism*, *in* THE ASHGATE RESEARCH COMPANION TO FEDERALISM 297–313 (Lee Ward & Ann Ward eds., 2009).

[127] See e.g. the European Council on Foreign Relations' 2016 Foreign Policy Scorecard, which ranks the foreign policy performance of the EU institutions and the Member States collectively on a number of files (including the EU's policy towards Russia, China, the US) between B+ and C. The analysis focused on a number of criteria, including strategy, impact, unity and resources. See EUROPEAN COUNCIL ON FOREIGN RELATIONS, EUROPEAN FOREIGN POLICY SCORECARD 2016 (2016), http://www.ecfr.eu/page/-/ECFR157_SCORECARD_2016.pdf (last visited Mar 26, 2017).

after the latter's annexation of the Crimean peninsula, for institutional reasons the EU is unable to prevent individual Member States from engaging in independent policies.[128] The alliance between Russia and Hungary is a case in point: even though Prime Minister Orban agreed to the sanctions regime, this did not stand in the way of him inviting Russian President Putin on a state visit to Budapest, and to conclude an agreement with Russia to finance a nuclear power plant.[129]

The pluralist predicament is not only undesirable as a matter of policy effectiveness; it also undermines the legitimacy of the EU in the eyes of the European citizenry. This is the case, as the language of EU constitutionalism at work in the case law of the ECJ raises certain expectations of unity and effectiveness; in particular, it paints a picture of an EU capable of acting in a unified manner on the international stage. The mismatch between this 'integrative institutionalist' or 'constitutional' language on the one hand, and institutional practice on the other, in which Member States retain control over the EU decision-making process, shatters these expectations.[130] As Peter Lindseth recently argued in more general terms, but the argument arguably extends to the foreign relations context: it unmasks EU constitutionalism as a form of 'as if' constitutionalism. He held: 'National institutions are increasingly constrained in the exercise of their own constitutional authority but supranational institutions are unable to fill the void because Europeans refuse to endow them with the *sine qua non* of genuine constitutionalism: the autonomous capacity to mobilise fiscal and human resources in a compulsory fashion.'[131]

Lindseth concluded his argument on a normative note by arguing that an awareness of the 'as if' character of EU constitutionalism should lead us to understand EU law in administrative, as opposed to constitutional terms. In Lindseth's view, EU law should, as the German *Bundesverfassungsgericht* has suggested in its *Maastricht* and *Lissabon* case law, should give up its claims to supremacy over the legal orders of the Member States. Applied to the context of foreign relations, this approach would require the ECJ to abandon the integrative

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[128] Orenstein and Kelemen, *supra* note 120 at 88.

[129] Marton Dunai, *Hungary tests EU nerves frayed by Russia as Putin visits Budapest*, REUTERS, February 1, 2017, http://www.reuters.com/article/us-russia-hungary-idUSKBN15G4XW (last visited Apr 9, 2017).

[130] This gap between expectations and capabilities has famously been theorized in the early 1990s by Christopher Hill. See his *The Capability-Expectations Gap, or Conceptualizing Europe's International Role*, 31 JCMS: JOURNAL OF COMMON MARKET STUDIES 305–328 (1993).

[131] Peter L. Lindseth, *The Perils of "As If" European Constitutionalism*, 22 EUROPEAN LAW JOURNAL 696–718, 696 (2016).

institutionalist perspective, and interpret the EU's competences more narrowly, thereby fully embracing the practice of mixity.

This is one avenue to move forward. The alternative, of course, is the Habermasian avenue: through processes of deliberation, a European demos could gradually come into being.[132] As mutual trust gradually increases, and as Member State governments become more committed to making EU foreign policy work, the ECJ's broad reading of the EU's competences could perhaps garner more support amongst the Member States. This process is, however, a gradual one, which requires sustained political action at both the EU and Member State levels of government. At the Member State level, Europeans must hold their representatives in the Council accountable, and urge them to act in accordance with the common EU interest. At the EU level, political action is required to open up the Council 'black box.' For only through increased transparency will meaningful accountability become a possibility.[133] These strategies will only be effective in the medium- to long term, however. In the short term, it would appear that Europe will remain stuck in its pluralist predicament, caught between a desire to integrate further and a persistent resistance against doing so.

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[132] For the theoretical underpinnings of this process of establishing a European demos through the interaction between empirical and normative realities (facts and norms), see generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1998). For an application to the EU context, see Jürgen Habermas, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible*, 21 EUROPEAN LAW JOURNAL 546–557 (2015).

[133] For this reason, the work done by scholars such as Deirdre Curtin or Vigjilenca Abazi is important. See e.g. Deirdre Curtin, *Official secrets and the negotiation of international agreements: Is the EU executive unbound?*, 50 COMMON MARKET LAW REVIEW 423–457 (2013); Vigjilenca Abazi & Maarten Hillebrandt, *The legal limits to confidential negotiations: Recent case law developments in Council transparency: Access Info Europe and In't Veld, V. Abazi and M. Hillebrandt*, 52 COMMON MARKET LAW REVIEW 825–845 (2015).